

MAY 28 2003

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

Not for Publication

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**OREGON INVESTORS IX LP, an Oregon
limited partnership,**

Plaintiff - Appellant,

v.

**CITY OF MERCED; BARBARA
SULLIVAN, Mayor Pro Tempore of the
City of Merced and Vice Chairman of the
Merced City Council and Commissioner of
the Redevelopment Agency; STANLEY
THURSTON, Merced City Council
Member; HUBERT WALSH, Merced City
Council Member,**

Defendants - Appellees.

No. 02-15447

D.C. No. CV-01-06413-AWI

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted April 2, 2003
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: **B. FLETCHER, KOZINSKI and TROTT**, Circuit Judges.

The city council neither approved nor denied the project; its tie vote represented no action at all. See, e.g., Fisher v. Bd. of Police Comm'rs, 236 Cal. App. 2d 298, 301 (1965) (“[T]he action taken by the members did not constitute an effective exercise of discretion by the board as required by the charter . . .”). Appellant has not shown the council is unwilling to reconsider the project, and we can only speculate what action the council would take upon additional votes. Appellant’s claim is thus not ripe and, for that reason (not abstention), was properly dismissed. We therefore vacate the district court’s order and remand the case for entry of an order dismissing without prejudice.

VACATED AND REMANDED.